INTERESTS OF *AMICI CURIAE*

Center for Responsible Lending - *Amicus Curiae* the Center for Responsible Lending ("CRL") is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive lending practices in the mortgage market. In 2006, CRL researchers warned of the coming subprime foreclosure crisis, and in subsequent years it has published numerous reports detailing the cost of the foreclosure crisis to communities. CRL has frequently testified before Congress on the devastating financial impact of predatory subprime lending and advised state policymakers on how to respond to the crisis such lending has created. CRL is an affiliate of Self-Help, a non-profit lender that has provided more than $5 billion in responsible financing to help over 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources.

CRL has been actively promoting loan modifications as one way to address the foreclosure crisis currently impacting hundreds of thousands of American homeowners, and it is participating in this case because of the difficulties borrowers can have in obtaining such modifications when they do not know the owner of their loan. MERS's practice of filing motions to lift the bankruptcy stay in its own name is one of the reasons homeowners do not know this information. Additionally, CRL is concerned about the difficulties the MERS system creates for borrowers seeking to obtain legal relief for a predatory loan.

National Association of Consumer Bankruptcy Attorneys – *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4000 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 400,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

NACBA and its membership have a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom own their homes. Across the country homeowners face motions for relief from stay by MERS even though they have never heard of MERS and MERS has no interest in their loan. Additionally, MERS generally refuses to identify the owner of the loan to the debtor. As a result, debtors are limited in their ability to assert claims against the owner of the loan in bankruptcy.

SUMMARY OF ARGUMENT

Mortgage Electronic Registration Systems, Inc. ("MERS") seeks relief from the automatic stay of foreclosure proceedings against bankrupt homeowners who do not owe MERS anything. MERS, however, lacks the standing and real-party-in-interest status necessary to do so because it has no financial interest in the foreclosures. MERS is a recent invention of the mortgage industry unrecognized by traditional mortgage law that, as its own documents prove, has no role in the lending process. Instead, it acts as a privatized county recorder's office that neither the borrower, the public, nor the bankruptcy court can access. MERS's efforts to use forms and legal sleight of hand to manufacture an interest in the bankrupt homeowners' loans do not cure its lack of standing and real-party-in-interest status.

Indeed, it is critically important to bankrupt homeowners that a party with a financial interest in the loans brings any motion to lift the foreclosure stay. As Congress has just explicitly recognized, homeowners facing foreclosure need to know who owns their loan in order to negotiate modifications and defend themselves against any abuses that occurred when the loan was originated. By using its name to prosecute lift stay motions, MERS deprives borrowers of such information and instead gives them the name of an entity that has no control over the loan or the foreclosure.

Moreover, even if MERS was the proper party to bring these motions to lift the stay, it could not deprive homeowners of bankruptcy's fundamental protection—the automatic stay—based on the flimsy documentation it submitted.

Accordingly, the bankruptcy court properly denied relief to MERS in all of the cases on appeal to this Court. Its opinions should be affirmed.

ARGUMENT

I. MERS LACKS STANDING AND REAL-PARTY-IN-INTEREST STATUS AS AN ENTITY UNKNOWN TO TRADITIONAL MORTGAGE LAW THAT SERVES NO ROLE IN THE LENDING PROCESS.

Nevada mortgage law, like mortgage law across the country, has developed settled predictability through well over one hundred years of common law jurisprudence and statutory enactments. The roles and rights of various players in a lending transaction—such as the borrower, the lender, and the trustee of the deed of trust—have been well settled. One of these settled principles is that the beneficiary of the deed of trust is the party to whom the debt is owed. *See Hellman v. Capurro*, 549 P.2d 750, 751 (Nev. 1976) ("A mortgagee or a beneficiary to a deed to trust is entitled to only one satisfaction of *his debt*." (emphasis added)); *see also*

Monterey S.P. P'ship v. W.L. Bangham, Inc., 777 P.2d 623, 627 (Cal. 1989) ("[A] deed of trust typically secures a debt owed the beneficiary . . . .").

MERS disrupts this well settled system by claiming it is a "beneficiary" of the deed of trust while holding no "beneficial ownership interests" in the loan. *See* MERS Br. 6 (acknowledging that MERS's purpose is to track the "beneficial ownership interests" of third parties); August 5 Declaration of William Hultman ("Hultman Decl. (8/5/08)") at ¶4 (Appx. 425) (claiming MERS remains the "beneficiary" when "beneficial ownership interest in the promissory note are transferred"). Such Alice-in-Wonderland-like contradictory assertions are wholly insufficient to give MERS standing and real-party-in-interest status in a federal court to seek relief from the Bankruptcy Code's automatic stay.[1]

A. MERS Allows the Mortgage Industry To Avoid Public Recordation of the Assignments Necessary To Create Mortgage Securities.

MERS is a recent creation of the mortgage industry. It was incorporated in October 1995, with the Mortgage Bankers Association as a charter member. R.K. Arnold, *Yes, There Is Life on MERS*, Prob. & Prop., Aug. 1997, at 33.[2] Although Nevada law provides for the public recordation of assignments of beneficial interests in deeds of trust, *see* Nev. Rev. Stat. § 107.070, MERS was created for the express purpose of facilitating the trading of mortgage rights "electronically among its members without the need to record a mortgage assignment in the public land records each time," Arnold, *supra*, at 33; *see also* Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 806 (1995) (noting the mortgage industry sought to create its own private "central, electronic registry for tracking

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[1] The appellees' brief provides a thorough review of the principles of standing and real-party-in-interest status, and *amici* incorporate that discussion.
[2] The author of this article was general counsel of MERS.

mortgage rights" that allows "participants in the lending industry . . . to obtain, transfer, and identify interests in mortgages essentially on a real time basis").[3] MERS serves at least three functions for the mortgage industry: it allows the industry to privately track the ownership of loans; it provides a "tax avoidance tool" eliminating the need to pay recording taxes or fees for assignments; and it facilitates home foreclosures. Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2212 (2007).

In effect, MERS acts as a privatized county recorder's office for the purpose of facilitating the sale of home loans on the secondary market. Under the MERS system, mortgage originators, lenders, servicers, and investors "register" their loans with MERS. Hultman Decl. (8/5/08) at ¶3 (Appx. 425). Because the deed of trust designates MERS as the nominal beneficiary, MERS is listed as the beneficiary in county land records. *See id.* ¶4. Subsequent transfers of the mortgage loans between MERS members are tracked only through the MERS system and not memorialized in public property records. *See id.* However, when those same transfers are made from a MERS member to a non-MERS member, an assignment of the deed of trust from MERS to the non-MERS member is supposed to be recorded in the county where the secured property is located. *See id.* (Appx. 426).

The creation of MERS was meant to facilitate the burgeoning volume of mortgage loan transfers that were occurring "[a]s investors bought more and more loans in the secondary market." Arnold, *supra*, at 34; *see also* Slesinger & Mclaughlin, *supra*, at 812. Before the burst of the housing bubble, Wall Street firms had met this investor demand by creating "mortgage-backed securities" that gave investors rights to receive payments from thousands of mortgage

[3] The authors of this article were two officials with the Mortgage Bankers Association, the mortgage industry trade group that was instrumental in MERS's creation.

loans that had been pooled together. In assembling the thousands of mortgage loans, each and every individual loan was subject to a series of transfers. At a minimum, lenders had to assign ownership of each loan in the pool to a trust that held the loans on the investors' behalf. *See* Peterson, *supra*, at 2206-09; Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 Fordham L. Rev. 2039, 2045-46 (2007). While ownership of the loans was transferred to these trusts, the trusts typically contracted with "servicers" to collect payments from and handle communications with borrowers. *See* 12 U.S.C. § 2605(e), (i)(2)-(3) (defining "servicer" for purposes of the Real Estate Settlement Procedures Act and setting forth duties of the servicer).

B. MERS Has No Financial Interest in the Loans.

At no point during the process of pooling loans and selling security interests in those loan pools did MERS become entitled to receive payments from borrowers. Instead, its only function is to serve as a placeholder in the county land records for whomever owns the loan at any given moment. Indeed, MERS has carefully avoided asserting any interest in the loan payments (or proceeds of a foreclosure) in the cases presently before this Court. Nothing in the record, including the declarations of MERS Secretary William Hultman, claims that MERS is entitled to any repayments or foreclosure proceeds. To the contrary, Hultman declares that MERS acts on behalf of other parties with "beneficial ownership interests in the promissory note." Hultman Decl. (8/5/08) at ¶4 (Appx. 425). Similarly, the MERS membership rules clearly state that members are never permitted to claim MERS is a "note-owner" as part of foreclosure proceedings. Rules of Membership, Rule 8, Section 2(a)(i), 2(c) (Appx. 469-70). And for good reason, because, as noted by the bankruptcy court, MERS's Terms and Conditions specify that

"MERS shall have no rights *whatsoever* to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans." MERS Terms and Condition at ¶ 2 (Appx. 490) (emphasis added).

MERS's complete lack of interest in the proceeds of the loans is corroborated by the decisions of other courts that have examined the function of MERS. For instance, the United States Court of Appeals for the Seventh Circuit has described MERS's complete lack of substantive involvement in the lending transaction:

> MERS is not the lender. It is a membership organization that records, trades, and forecloses loans on behalf of many lenders, acting for their accounts rather than its own. . . . It is a nominee only, holding title to the mortgage but not the note. Each lender appears to be entitled not only to payment as the note's equitable (and legal) owner but also to control any litigation and settlement.

Mortgage Elec. Registration Sys., Inc. v. Estrella, 390 F.3d 522, 524-25 (7th Cir. 2004).

Similarly, the Nebraska Supreme Court has "conclude[d] that MERS does not acquire mortgage loans" because "simply stated, MERS has no independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money." *Mortgage Elec. Registration Sys., Inc. v. Neb. Dep't of Banking & Fin.*, 704 N.W.2d 784, 788 (Neb. 2005). This conclusion relied upon MERS's arguments to that court that

> it only holds legal title to members' mortgages in a nominee capacity and is *contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members*. Further, MERS argues that it does not own the promissory notes secured by the mortgages and has no right to the payments made on the notes.

Id. at 787 (emphasis added).

Most recently, the Arkansas Supreme Court earlier this year "specifically reject[ed] the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act." *Mortgage Elec. Registration Sys., Inc. v. S.W. Homes of Ark.*, __ S.W.3d __, 2009 WL 723182 (Ark. Mar. 19, 2009) (slip op. at 4-5). Based on that fact, Arkansas' highest court went on to hold that

> MERS is not the beneficiary, even though it is so designated in the deed of trust. Pulaski Mortgage, as the lender on the deed of trust, was the beneficiary. It receives the payments on the debt.

Id. (slip op. at 6).

The holding of the Arkansas Supreme Court, which MERS ignores in its brief to this Court, directly contradicts MERS's argument on appeal that the bankruptcy court holding that MERS was not the beneficiary of the deed of trust conflicted with "courts across the country." *See* MERS Br. 16-20. Moreover, the Kansas Court of Appeals, in reviewing MERS's role in home loan transactions, has rejected the claim in MERS's brief that this Court is obligated to treat it as the beneficiary of the deed of trust simply because it is designated as such on the face of the document:

> We must pay close attention not only to the terms given to the parties in carefully crafted documents but also to the roles each party actually performed. No matter the nomenclature, the true role of a party shapes the application of legal principles in this case.

Landmark Nat'l Bank v. Kesler, 192 P.3d 177, 179 (Kan. App. 2008), *review granted* (Kan. Feb. 11, 2009); *cf. Pahl v. Comm'r*, 150 F.3d 1124, 1129 (9th Cir. 1998) ("Determining who is a

beneficial shareholder requires analysis of the actual role the shareholder has played in corporate governance.").[4]

C. MERS Lacks Standing or Real-Party-in-Interest Status on Its Own Behalf.

Instead of asserting it is owed anything on its own behalf, MERS claims to serve as the "nominee" of the entities that are actually entitled to repayment. *See* Hultman Decl. 8/5/08 at ¶¶3, 4 (Appx. 425). This does not give MERS standing: "A well-founded prudential-standing limitation is that litigants cannot sue in federal court to enforce the rights of others." *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, __ F.3d ___, 2009 WL 2436669, at *2 (10th Cir. Aug. 11, 2009); *see also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) ("The doctrine of standing . . . requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)) (internal quotation marks omitted)); *Morrisson-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1214 (9th Cir. 1987) ("An indirect financial stake in another party's claims is insufficient to create standing on appeal."). Instead, an entity that has no financial stake in the outcome of a motion must proceed using the name of its principal. *See* Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest"); *Old Ben Coal Co. v. Office of Workers' Comp. Programs*, 476 F.3d

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[4] Contrary to the assertion in MERS's brief, *see* MERS Br. 24, the bankruptcy court's opinion does not warrant reversal even if it erred in holding that MERS was not the beneficiary under the deed of trust. The bankruptcy court alternatively held that "in any event, the mere fact that an entity is a named beneficiary of a deed of trust is insufficient to enforce the obligation." Opinion and Order, *In re Mitchell*, Bankr. No. 07-16226 ("Opinion and Order"), at 6 (Appx. 745).

418, 420 (7th Cir. 2007) (holding a party with "no possible stake in this litigation" is "not a real party in interest").[5]

MERS attempts to avoid this requirement by engaging in legal trickery that inflates form over substance. Through its system of creating "certifying officers," who sign affidavits as "assistant secretaries" of MERS, MERS purports to turn the loan owner's employees into its own employees and the contents of the owner's loan files into its own property. This legal sleight of hand proceeds in two steps: First, MERS creates a corporate resolution naming the owner's employees as MERS Certifying Officers. *See* Hultman Decl. (8/5/08) at ¶ 6 (Appx. 426) ("MERS provides Members a corporate resolution designating one or more employees *of the Member* a MERS Certifying Officer." (emphasis added)); Rules of Membership, Rule 3, Section 3(a) (Appx. 458-59) (detailing this process). Second, MERS then treats anything in the possession of its Certifying Officers—the owner's employees—as MERS's property. *See* Hultman Decl. (8/5/08) at ¶ 5 (Appx. 426) (detailing that MERS will plead it is the noteholder when a note is endorsed in blank and "in the possession of a MERS Certifying Officer"); Rules of Membership, Rule 8, Section 2(a) (Appx. 469) ("If a Member chooses to conduct foreclosures in the name of Mortgage Electronic Registration Systems, Inc., the note must be endorsed in blank and in *possession of one of the Member's* MERS certifying officers." (emphasis added)). Through this contrivance, MERS asserts in court filings (as it does in its brief to this Court

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[5] Because MERS has *no* financial interest in the loan, the situation before this Court is unlike the question of whether a mortgage servicer, which collects payments on the loan and keeps a portion of those payments as its fee, has standing or is a real party in interest. *See In re Woodberry*, 383 B.R. 373, 379 (Bankr. D.S.C. 2008) ("The general rule is that a mortgage servicer has standing by virtue of *its pecuniary interest* in collecting payments under the terms of the note and mortgage." (emphasis added)); *see also In re Hwang*, 396 B.R. 757, 768-69 (Bankr. C.D. Cal. 2008) (distinguishing whether a servicer is a "party in interest" or has standing from the question whether it is the "real party in interest").